

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL GARCIA,

Plaintiff,

v.

T. HASLEY, *et al.*,

Defendants.

Case No. CV 16-00912-JGB (AFM)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT WITH
LEAVE TO AMEND**

On February 9, 2016, plaintiff, an inmate presently incarcerated at the Kern Valley State Prison in Delano, California, filed a Complaint in this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. He subsequently was granted leave to proceed without prepayment of the full filing fee. The Complaint named as defendants T. Hasley and Esrebar Cardenas, both Correctional Officers at California State Prison, Los Angeles County (“CSP-LAC”). Plaintiff’s claims arose from an incident at CSP-LAC on December 28, 2012, when the correctional officers are alleged to have used excessive force. Plaintiff sought declaratory and injunctive relief as well as monetary damages.

In accordance with the terms of the “Prison Litigation Reform Act of 1995” (“PLRA”), the Court screened the Complaint prior to ordering service for purposes

1 of determining whether the action is frivolous or malicious; or fails to state a claim
 2 on which relief may be granted; or seeks monetary relief against a defendant who is
 3 immune from such relief. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C.
 4 § 1997e(c)(1).

5 Following careful review of the Complaint, the Court found that its
 6 allegations appeared insufficient to state any claim upon which relief may be
 7 granted. Accordingly, on March 9, 2016, the Complaint was dismissed with leave
 8 to amend, and plaintiff was ordered, if he wished to pursue the action, to file a First
 9 Amended Complaint no later than April 20, 2016. Further, plaintiff was
 10 admonished that, if he failed to timely file a First Amended Complaint, or failed to
 11 remedy the deficiencies of his pleading, the Court would recommend that this
 12 action be dismissed without leave to amend and with prejudice. (*See* ECF No. 8.)

13 Following an extension of time, plaintiff filed a First Amended Complaint
 14 (“FAC”) on June 24, 2016. (ECF No. 14.)¹ In the FAC, plaintiff names as
 15 defendants Warden Soto; Assistant Warden R. Fritz; Chief of Inmate Appeals
 16 Lozano; Sergeant Gamboa, with the Investigative Services Unit; various
 17 supervisory defendants; and Correctional Officers Hasley, Cardenas, and Berryhill.
 18 All defendants are named in their individual capacities. (*See* ECF No 14 at 3-6.)
 19 Plaintiff raises three claims, all arising from an incident that occurred at
 20 approximately 14:45 hours on December 28, 2012, and a subsequent Rules
 21 Violation Report (“RVR”) filed against plaintiff. (*Id.* at 3, 14.) Plaintiff seeks
 22 declarative and injunctive relief, including a rehearing on the RVR, and damages.
 23 (*Id.* at 28-31.)

24 Once again, in accordance with the mandate of the PLRA, the Court has
 25 screened the FAC prior to ordering service for purposes of determining whether the
 26 action is frivolous or malicious; or fails to state a claim on which relief may be
 27 granted; or seeks monetary relief against a defendant who is immune from such

28 ¹ The Court references the electronic pages of pleadings.

1 relief. The Court's screening of the FAC under the foregoing statutes is governed
 2 by the following standards. A complaint may be dismissed as a matter of law for
 3 failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or
 4 insufficient facts under a cognizable legal theory. *See Balistreri v. Pacifica*
 5 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Rosati v. Igbinoso*, 791
 6 F.3d 1037, 1039 (9th Cir. 2015) (when determining whether a complaint should be
 7 dismissed for failure to state a claim under the PLRA, the court applies the same
 8 standard as applied in a motion to dismiss pursuant to Rule 12(b)(6)). In
 9 determining whether the pleading states a claim on which relief may be granted, its
 10 allegations of material fact must be taken as true and construed in the light most
 11 favorable to plaintiff. *See Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.
 12 1989). However, the “tenet that a court must accept as true all of the allegations
 13 contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*,
 14 556 U.S. 662, 678 (2009).

15 Further, since plaintiff is a prisoner appearing *pro se*, the Court must construe
 16 the allegations of the pleading liberally and must afford plaintiff the benefit of any
 17 doubt. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir.
 18 1988); *see also Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008) (because a
 19 prisoner was proceeding *pro se*, “the district court was required to ‘afford [him] the
 20 benefit of any doubt’ in ascertaining what claims he ‘raised in his complaint’”)
 21 (alteration in original). Nevertheless, the Supreme Court has held that, “a plaintiff’s
 22 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
 23 than labels and conclusions, and a formulaic recitation of the elements of a cause of
 24 action will not do. . . . Factual allegations must be enough to raise a right to relief
 25 above the speculative level . . . on the assumption that all the allegations in the
 26 complaint are true (even if doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550
 27 U.S. 544, 555 (2007) (internal citations omitted, alteration in original); *see also*
 28 *Iqbal*, 556 U.S. at 678 (To avoid dismissal for failure to state a claim, “a complaint

1 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief
 2 that is plausible on its face.’ . . . A claim has facial plausibility when the plaintiff
 3 pleads factual content that allows the court to draw the reasonable inference that the
 4 defendant is liable for the misconduct alleged.” (internal citation omitted)); *Starr v.*
 5 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“the factual allegations that are taken as
 6 true must plausibly suggest an entitlement to relief, such that it is not unfair to
 7 require the opposing party to be subjected to the expense of discovery and
 8 continued litigation”).

9 After careful review of the FAC under the foregoing standards, the Court
 10 finds that the factual allegations may be sufficient to state a claim for the excessive
 11 use of force against some defendants, but the allegations appear insufficient to state
 12 any other claim. Accordingly, the FAC is dismissed with leave to amend. *See*
 13 *Rosati*, 791 F.3d at 1039 (“A district court should not dismiss a *pro se* complaint
 14 without leave to amend unless it is absolutely clear that the deficiencies of the
 15 complaint could not be cured by amendment.”) (internal quotation marks omitted).

16 **If plaintiff desires to pursue this action, he is ORDERED to file a Second
 17 Amended Complaint no later than November 30, 2016, remedying the
 18 deficiencies discussed below.** Further, plaintiff is admonished that, if he fails to
 19 timely file a Second Amended Complaint, or fails to remedy the deficiencies of this
 20 pleading as discussed herein, the Court will recommend that this action be
 21 dismissed without leave to amend and with prejudice.²

24 ² Plaintiff is advised that this Court’s determination herein that the allegations in
 25 the First Amended Complaint are insufficient to state a particular claim should not
 26 be seen as dispositive of that claim. Accordingly, although this Court believes that
 27 you have failed to plead sufficient factual matter in your pleading, accepted as true,
 28 to state a claim to relief that is plausible on its face, you are not required to omit any
 claim or defendant in order to pursue this action. However, if you decide to pursue
 a claim in a Second Amended Complaint that this Court has found to be
 insufficient, then this Court, pursuant to the provisions of 28 U.S.C. § 636,

1 **A. Plaintiff's allegations may be sufficient to state an Eighth Amendment**
 2 **claim against defendants Hasley, Cardenas, and Berryhill.**

3 Plaintiff alleges that Officer Hasley struck plaintiff from behind while
 4 plaintiff was not resisting, and then plaintiff's feet were "swept from under him"
 5 and he was "body slammed" by Hasley. Officers Cardenas and Berryhill
 6 "observed" but did not intervene. (ECF No. 14 at 14-15, 24.) While plaintiff was
 7 laying on the ground, Officers Hasley and Cardenas repeatedly hit him with their
 8 fists, knees, and feet. (*Id.* at 15.)

9 The use of excessive force by a prison official against a convicted prisoner
 10 constitutes a violation of the Eighth Amendment. *See Hudson v. McMillian*, 503
 11 U.S. 1, 6-7 (1992). However, the use of force against prisoners "does not amount
 12 to a constitutional violation . . . if it is applied in a good faith effort to restore
 13 discipline and order and not 'maliciously and sadistically for the very purpose of
 14 causing harm.'" *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). (quoting
 15 *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)); *see also Furnace v. Sullivan*, 705
 16 F.3d 1021, 1028 (9th Cir. 2013) (the constitutional analysis turns on "whether force
 17 was applied in a good faith effort to maintain or restore discipline or maliciously
 18 and sadistically for the very purpose of causing harm").

19 In addition, safety officers have a duty to intervene when their fellow officers
 20 violate the constitutional rights of a suspect or other citizen, but such a duty only
 21 arises if an officer has a "realistic opportunity to intercede." *Cunningham v. Gates*,
 22 229 F.3d 1271, 1290 (9th Cir. 2000) (finding that "non-shooting officers who were
 23 present at the shootouts had no realistic opportunity to intercede" and could not be
 24 held liable for failing to prevent the shooting) (internal quotation marks omitted));
 25 *Lolli v. County of Orange*, 351 F.3d 410, 418 (9th Cir. 2003) (supervising sergeant

26 ultimately may submit to the assigned district judge a recommendation that such
 27 claim be dismissed with prejudice for failure to state a claim, subject to your right
 28 at that time to file Objections with the district judge as provided in the Local Rules
 Governing Duties of Magistrate Judges.

1 who observed an incident involving a detainee at a jail may be held liable for failing
2 to intervene); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (prison
3 officials can violate a prisoner's Eighth Amendment rights by failing to intervene, if
4 they had an opportunity to intervene).

5 Here, plaintiff's factual allegations, accepted as true and construed in the
6 light most favorable to plaintiff, appear sufficient to plausibly suggest that Officers
7 Hasley and Cardenas used force maliciously and sadistically during the incident on
8 December 28, 2012. The factual allegations may also be sufficient to state a claim
9 against Officer Berryhill for failing to intervene, but plaintiff fails to set forth any
10 factual allegations concerning Officer Berryhill's location or Berryhill's ability to
11 intervene during the incident. As presently alleged, the factual allegations fail to
12 give rise to a reasonable inference that Officer Berryhill was in a position to have
13 had a realistic opportunity to intervene in what appears to have been a relatively
14 brief and unexpected use of force. *See, e.g., Gaudreault v. Salem*, 923 F.2d 203,
15 207 n.3 (1st Cir. 1990) (finding officers present at the scene of an assault who did
16 not prevent the attack could not be held liable for failing to intercede because they
17 had "no realistic opportunity" to prevent an attack that "came quickly and was over
18 in a matter of seconds").

19

20 **B. Plaintiff's allegations appear insufficient to state an Eighth Amendment**
21 **for inadequate medical care.**

22 Plaintiff's FAC appears to allege that he was provided inadequate medical
23 treatment following the incident on December 28, 2012, in which excessive force
24 was allegedly used. Plaintiff alleges that he "made several requests" for medical
25 treatment to defendant Villalobos, but he was not taken to the treatment center until
26 approximately 17:00 hours. (ECF No. 14 at 16.) Plaintiff complained of "blurred
27 vision, nausea, dizziness and pain on [sic] his chest, back, knees, face." (*Id.*)
28 During his medical evaluation, the staff failed to follow a "concussion protocol"

1 and only recorded a “minor bruise.” (*Id.* at 22.) Later, plaintiff submitted “several
 2 sick-call slips regarding his blurred vision and constant headaches to the medical
 3 staff.” (*Id.* at 23.) Plaintiff did not receive “follow-up” treatment, and he continues
 4 to suffer from “diminished vision and memory loss.” (*Id.*)

5 To the extent that plaintiff is purporting to allege that one or more defendants
 6 provided inadequate medical care at any time, in order to establish a claim under
 7 the Eighth Amendment for inadequate medical care, a prisoner must show that a
 8 specific defendant was deliberately indifferent to his serious medical needs. *See*
 9 *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106
 10 (1976). “This includes both an objective standard – that the deprivation was serious
 11 enough to constitute cruel and unusual punishment – and a subjective standard –
 12 deliberate indifference.” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014)
 13 (internal quotation marks omitted).

14 First, to meet the objective element of a deliberate indifference claim, “a
 15 prisoner must demonstrate the existence of a serious medical need.” *Colwell*, 763
 16 F.3d at 1066. “A medical need is serious if failure to treat it will result in
 17 significant injury or the ‘unnecessary and wanton infliction of pain.’” *Peralta v.*
 18 *Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946
 19 (2015) (internal quotation marks omitted).

20 Second, to meet the subjective element, a prisoner must “demonstrate that the
 21 prison official acted with deliberate indifference.” *Toguchi v. Chung*, 391 F.3d
 22 1051, 1057 (9th Cir. 2004). Deliberate indifference may be manifest by the
 23 intentional denial, delay or interference with a plaintiff’s medical care. *See Estelle*,
 24 429 U.S. at 104-05. The prison official, however, “must not only ‘be aware of facts
 25 from which the inference could be drawn that a substantial risk of serious harm
 26 exists,’ but that person ‘must also draw the inference.’” *Toguchi*, 391 F.3d at 1057
 27 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Thus, an inadvertent
 28 failure to provide adequate medical care, negligence, a mere delay in medical care

(without more), or a difference of opinion over proper medical treatment, all are insufficient to constitute an Eighth Amendment violation. *See Estelle*, 429 U.S. at 105-07; *Toguchi*, 391 F.3d at 1059-60; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). Moreover, the Eighth Amendment does not require optimal medical care or even medical care that comports with the community standard of medical care. “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Estelle*, 429 U.S. at 106.

Here, plaintiff’s disagreement with a medical provider’s choice of treatment does not give rise to a federal civil rights claim. *See, e.g., Cano v. Taylor*, 739 F.3d 1214, 1217 (9th Cir 2014) (prisoner’s difference of opinion as to his medical treatment “is not actionable”); *Toguchi*, 391 F.3d at 1058 (a prisoner must show that the chosen course of treatment was “medically unacceptable under the circumstances” and was chosen “in conscious disregard of an excessive risk” to the prisoner’s health). Further, the failure of prison officials to comply with prison regulations or state law in providing medical treatment to plaintiff similarly does not give rise to a federal civil rights claim. Rather, in order to state a claim against a particular defendant for violation of his civil rights under 42 U.S.C. § 1983, plaintiff must allege that a specific defendant, while acting under color of state law, deprived him of a right guaranteed under the United States Constitution or a federal statute. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Karim-Panahi*, 839 F.2d at 624. Moreover, the factual allegations of the FAC reflect that plaintiff received treatment approximately two hours after the incident in question. (ECF No. 14 at 14, 16.) A brief delay in medical care is insufficient to constitute an Eighth Amendment violation. *See, e.g., Shapley*, 766 F.2d at 407 (a mere delay, without more, is insufficient to state a claim of deliberate medical indifference).

In addition, to the extent that plaintiff is purporting to raise a civil rights claim arising from his medical treatment subsequent to the incident, plaintiff fails to allege that any defendant was responsible for providing plaintiff follow-up medical care. In order to state a federal civil rights claim against a particular defendant, plaintiff must allege that a defendant took an action, participated in another's action, or omitted to perform an act that he or she was legally required to do that *caused* a violation of plaintiff's constitutional rights. "A person deprives another 'of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiffs complain].'" *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (emphasis and alteration in original)).

Accordingly, the Court finds that plaintiff's factual allegations, even accepted as true and construed in the light most favorable to plaintiff, are insufficient to nudge any claim for inadequate medical care pursuant to the Eighth Amendment claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

C. Plaintiff's allegations appear insufficient to state a claim against the supervisory defendants.

Plaintiff names as defendants Warden Soto, Sergeant Villalobos, Lieutenant Brown, and Assistant Warden Fritz. Plaintiff alleges that defendants Fritz, Brown, and Villalobos were "placed on notice of the abusive conduct of defendants T. Hasley and E. Cardenas by a number of complaints" over "several months," but he fails to set forth any factual allegations pertaining to any incident other than the one that occurred on December 28, 2012. (ECF No. 14 at 17.) Plaintiff also sets forth conclusory allegations that Fritz, Brown, and Villalobos failed to adequately supervise correctional officers, and failed to "curb the known pattern of physical

1 abuse of inmates.” (*Id.* at 24, 30.) In addition, plaintiff alleges that Warden Soto
2 violated the Eighth Amendment by his “failure to adequately train custody staff in
3 the appropriate use of force” and his failure to supervise other defendants. (*Id.* at
4 25-26.)

5 Plaintiff appears to be seeking to hold these defendants liable based solely on
6 their supervisory role. However, the Supreme Court has emphasized that
7 “Government officials may not be held liable for the unconstitutional conduct of
8 their subordinates under a theory of respondeat superior.” *Iqbal*, 556 U.S. at 676.
9 Rather, plaintiff must allege that each defendant “through the official’s own
10 individual actions, has violated the Constitution.” *Id.* at 676-77 (“each Government
11 official, his or her title notwithstanding, is only liable for his or her own
12 misconduct”). *See also Starr*, 652 F.3d at 1207 (a supervisor is liable only if he or
13 she is personally involved in the constitutional deprivation or there exists a
14 “sufficient causal connection between the supervisor’s wrongful conduct and the
15 constitutional violation” (internal quotation marks omitted)). Accordingly, to the
16 extent that plaintiff is purporting to hold any of the supervisory defendants liable on
17 a theory that a particular defendant failed to adequately train the correctional
18 officers in the use of force, plaintiff should set forth a short and plain statement of
19 the defendant’s own culpable action or inaction in training, or the supervisor’s
20 knowing acquiescence in a constitutional deprivation.

21 Moreover, to the extent that plaintiff is purporting to hold any of the
22 supervisory defendants liable on a theory that a particular defendant failed to take
23 action in response to a *pattern* of constitutional violations, plaintiff’s FAC fails to
24 set forth any factual allegations pertaining to any other incident of excessive force.
25 Allegations of one incident with a few inadequately trained individuals do not raise
26 an inference either that inadequate training caused the alleged constitutional
27 violation of which plaintiff complains, or that any supervisory defendant was
28 deliberately indifferent to a lack of training. *See Marsh v. County of San Diego*,

1 680 F.3d 1148, 1159 (9th Cir. 2012) (allegations of an isolated instance of a
 2 constitutional violation are insufficient to support a “failure to train” theory). The
 3 Court is not required to accept as true plaintiff’s bare assertions that his
 4 constitutional deprivations resulted from official policies, customs and pervasive
 5 practices. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004)
 6 (a court is not “required to accept as true allegations that are merely conclusory,
 7 unwarranted deductions of fact, or unreasonable inferences”). Nor is the Court
 8 “bound to accept as true a legal conclusion couched as a factual allegation.” *Wood*
 9 *v. Moss*, 134 S. Ct. 2056, 2065 n.5 (2014) (citing *Iqbal*, 556 U.S. at 678).
 10 Accordingly, the Court finds that the FAC fails to set forth any factual allegations
 11 plausibly suggesting that the execution of any specific policy, ordinance, regulation,
 12 custom or the like was the “actionable cause” of his alleged constitutional violation.
 13 *See Tsao*, 698 F.3d at 1146; *Lee v. City of Los Angeles*, 250 F.3d 668, 681-82 (9th
 14 Cir. 2001) (plaintiff must allege that the local entity’s custom or policy was the
 15 “moving force behind the constitutional violation[s]”).

16

17 **D. Plaintiff’s allegations appear insufficient to state a claim arising from his**
 18 **administrative grievance.**

19 Plaintiff names the Chief of Inmate Appeals Lozano, Sergeant Gamboa, and
 20 Miguel as defendants. It appears to the Court that plaintiff may be purporting to
 21 hold these defendants liable based on their handling of plaintiff’s complaint of staff
 22 misconduct and his subsequent administrative appeal. (*See* ECF No. 14 at 19, 21,
 23 27-28.)

24 A prisoner has no constitutional right to an effective grievance or appeal
 25 procedure. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that
 26 a prisoner has no constitutional right to an effective grievance or appeal procedure);
 27 *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). In addition, the guarantee of
 28 substantive and procedural due process under the Fourteenth Amendment applies

only when a constitutionally protected liberty or property interest is at stake. *See Ingraham v. Wright*, 430 U.S. 651, 672 (1977). An administrative appeal system does not implicate a liberty interest protected by the Due Process Clause. *See, e.g., Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996). In his FAC, plaintiff fails to set forth any factual allegations that raise a reasonable inference that any defendant responsible for handling plaintiff's grievance "actually knew" that his or her failure to adequately resolve the grievance placed plaintiff at a serious risk. *See, e.g., Peralta*, 744 F.3d at 1087 (9th Cir. 2014) (defendant's "failure to follow required procedure for inmate appeals "isn't, of itself, enough to establish a violation of [prisoner's] constitutional rights," the prisoner must show both that the failure "put inmates at risk" and that the defendant "actually knew that his actions put inmates at risk" (emphasis in original)).

13

E. Plaintiff's allegations appear insufficient to state a due process claim arising from the disciplinary hearing.

Plaintiff alleges that defendant Harris violated his due process rights by failing to secure a "signed waiver" from plaintiff that waived his right to be present at the disciplinary hearing on his RVR, and that Harris failed to call witnesses requested by plaintiff and consider other evidence. (ECF No. 14 at 18-19, 27.) Plaintiff also alleges that Harris did not ensure that plaintiff's absence at the administrative hearing was voluntary. (*Id.* at 18.) Following the hearing, plaintiff was found guilty of battery on a peace officer. (*Id.* at 19.) In addition, plaintiff alleges that the loss of credit imposed by the guilty finding on the RVR does not implicate his release date because plaintiff is serving a life sentence. (*Id.* at 29.)

First, to the extent that plaintiff is seeking to have the guilty finding on the RVR set aside, a petition for habeas corpus is a prisoner's sole judicial remedy when attacking "the validity of the fact or length of ... confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973); *Young v. Kenny*, 907 F.2d 874, 875 (9th

1 Cir. 1990). Further, a prisoner's challenge to a disciplinary action that necessarily
 2 implicates the length of his or her confinement must be brought in a petition for
 3 habeas corpus. *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (barring § 1983
 4 challenge to prison disciplinary hearing because success on the claim would result
 5 in automatic reversal of a disciplinary sanction); *Wolff v. McDonnell*, 418 U.S. 539,
 6 554-55 (1974) (holding that prisoners may not use § 1983 to obtain restoration of
 7 good-time credits). Thus, a plaintiff may not use a civil rights action to challenge
 8 the validity of his continued incarceration, seek expungement of his disciplinary
 9 conviction(s), or seek the restoration of any lost good-time credits. Such relief only
 10 is available in a habeas corpus action. However, “challenges to disciplinary
 11 proceedings are barred by *Heck* only if the § 1983 action would be ‘seeking a
 12 judgment at odds with [the prisoner’s] conviction or with the State’s calculation of
 13 time to be served.’” *Nettles v. Grounds*, 830 F.3d 922, 935 (9th Cir. 2016) (en
 14 banc) (citing *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (alteration in
 15 original)). “If the invalidity of the disciplinary proceedings, and therefore the
 16 restoration of good-time credits, would not necessarily affect the length of time to
 17 be served, then the claim falls outside the core of habeas and may be brought in §
 18 1983.” *Id.*; *see, e.g., Pratt v. Hedrick*, 2015 WL 3880383, at *3, 2015 U.S. Dist.
 19 Lexis 81432 (N.D. Cal. June 23, 2015) (§ 1983 challenge to disciplinary conviction
 20 not barred by *Heck* where the removal of the RVR or the restoration of time credits
 21 would not necessarily result in speedier release for an inmate with an indeterminate
 22 life sentence and no parole date).

23 Here, plaintiff alleges that his length of time to be served would not be
 24 impacted by the expungement of the guilty finding on the RVR. Accordingly, it
 25 does not appear that his due process claim is barred by *Heck*.

26 Second, as noted, the federal guarantee of procedural due process under the
 27 Fourteenth Amendment applies only when a constitutionally protected liberty
 28 interest is at stake. *See Ingraham*, 430 U.S. at 672. In the prison context, the

1 Supreme Court has held that the Due Process Clause does not protect a prisoner's
2 alleged liberty interest where a sanction "is within the normal limits or range of
3 custody which the conviction has authorized the State to impose." *See Meachum v.*
4 *Fano*, 427 U.S. 215, 225 (1976). Constitutionally protected liberty interests "will
5 be generally limited to freedom from restraint which, while not exceeding the
6 sentence in such an unexpected manner as to give rise to protection by the Due
7 Process Clause of its own force, nonetheless imposes atypical and significant
8 hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*
9 *v. Connor*, 515 U.S. 472, 483-84 (1995). As observed by the Supreme Court in
10 *Sandin*, 515 U.S. at 484-87, due process does not protect every change in the
11 conditions of confinement that results in a substantial adverse impact on the
12 prisoner. For example, courts have held that a prisoner does not have a
13 constitutionally protected liberty interest in remaining in the general prison
14 population (*see Anderson v. County of Kern*, 45 F.3d 1310, 1315 (9th Cir. 1995));
15 that a prisoner does not have a constitutionally protected liberty interest in good
16 time credits (*see Wolff*, 418 U.S. at 557); that temporarily confining a prisoner in
17 severe conditions during an investigative contraband watch does not give rise to a
18 protected liberty interest (*see Chappell v. Mandeville*, 706 F.3d 1052, 1063 (9th
19 Cir. 2013)), and that placing a prisoner in disciplinary segregation for 14 days for
20 violating prison regulations does not violate a protected liberty interest (*see*
21 *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th Cir. 1995)). The Ninth Circuit, however,
22 has found that a twenty-seven month confinement in an "Intensive Management
23 Unit" -- in which the prisoner was subjected to "solitary confinement for over
24 twenty-three hours each day with almost no interpersonal contact" and denied most
25 privileges provided to inmates in the general population -- imposed an atypical and
26 significant hardship that implicated a protected liberty interest. *Brown v. Or. Dep't*
27 *of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014); *see also Serrano v. Francis*, 345 F.3d
28 1071 1078-79 (9th Cir. 2003) (finding a state-created liberty interest arising from

1 the unique situation of a disabled inmate being confined to administrative
2 segregation for nearly two months without his wheelchair, not being able to use the
3 toilet without crawling across the floor, not being able to take a proper shower, and
4 not being able to partake of outdoor exercise).

5 In the FAC, plaintiff sets forth no factual allegations pertaining to any
6 conditions of his confinement that he alleges posed an atypical and significant
7 hardship. Further, plaintiff does not allege that the duration of any conditions of his
8 confinement was sufficient to constitute such a hardship. Accordingly, as presently
9 alleged, the imposition of discipline fails to give rise to a protected liberty interest
10 implicating the Due Process Clause.

11 The Court therefore finds that the FAC fails to allege any facts giving rise to
12 a plausible claim pursuant to the Due Process Clause of the Fourteenth
13 Amendment.

14

15

16 If plaintiff still desires to pursue this action, **he is ORDERED to file a**
17 **Second Amended Complaint no later than November 30, 2016**, remedying the
18 pleading deficiencies discussed above. The Second Amended Complaint should
19 bear the docket number assigned in this case; be labeled “Second Amended
20 Complaint”; and be complete in and of itself without reference to the original
21 Complaint, the First Amended Complaint, or any other pleading, attachment, or
22 document.

23 The clerk is directed to send plaintiff a blank Central District civil rights
24 complaint form, which plaintiff is encouraged to utilize. Plaintiff is admonished
25 that he must sign and date the civil rights complaint form, and he must use the
26 space provided in the form to set forth all of the claims that he wishes to assert in a
27 Second Amended Complaint.

28

1 In addition, if plaintiff no longer wishes to pursue this action, he may request
2 a voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure
3 41(a). The clerk also is directed to attach a Notice of Dismissal form for plaintiff's
4 convenience.

5 Plaintiff is further admonished that, if he fails to timely file a Second
6 Amended Complaint, or fails to remedy the deficiencies of this pleading as
7 discussed herein, the Court will recommend that the action be dismissed with
8 prejudice on the grounds set forth above and for failure to diligently prosecute.

9 **IT IS SO ORDERED.**

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11 DATED: 10/21/2016



13 ALEXANDER F. MacKINNON
14 UNITED STATES MAGISTRATE JUDGE

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